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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996)
)
Amendment to Rules Governing)
Procedures to Be Followed When)
Formal Complaints are Filed Against)
Common Carriers)

CC Docket No. 96-238

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AT&T COMMENTS

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AT&T's Proposed Modifications to the Commission's
Proposed Rule Changes for Formal Complaints

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AT&T COMMENTS

Pursuant to the Commission's Notice of Proposed Rulemaking released November 27, 1996 (FCC 96-460) ("NPRM"), AT&T submits the following comments on the Commission's proposals to modify the rules applicable to formal complaints against common carriers.

Introduction and Summary

As the Commission has recognized, this review of its formal complaint procedures is appropriate in light of the new deadlines for resolving complaints established in the Telecommunications Act of 1996 ("1996 Act"). Most of the NPRM's proposed changes are both necessary and proper in the context of the abbreviated time periods for all complaints that were established in the 1996 Act and will, as the Commission (§ 2) expects, "facilitate faster

resolution" of such proceedings.¹ Moreover, AT&T supports the Commission's proposals to place all discovery in the purview of the Commission staff. This will streamline the litigation of all formal complaint cases and help to assure that cases can be decided within the statutory deadlines and without unnecessary burdens on the parties or the Commission.

AT&T believes, however, that the Commission's rules should in certain cases recognize the difference between complaints brought pursuant to Section 271 -- which will typically involve specific conduct and a limited factual background and must be decided within 90 days -- and other complaints which may be resolved within a longer period. Thus, AT&T proposes some specific modifications to the Commission's proposed rule changes that take account of these differences.

I. The 1996 Act Does Not Affect the Commission's Existing Authority Under Section 208.

As a threshold matter, AT&T concurs with the NPRM's tentative conclusion (§ 5) that the 1996 Act does not diminish the Commission's existing broad authority under Section 208. Section 261(a) specifically provides that

¹ See also NPRM, § 27 (Commission seeks to promote actions that will reduce the number of complaints filed and narrow the scope of disputed issues).

"nothing in this part [Part II] shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part." Congress' specific references to the Commission's duties to resolve formal complaints in Section 271 and elsewhere in the 1996 Act affect the time in which such matters must be decided, but they do not affect any of the Commission's existing substantive authority under Section 208.

II. Comments on Specific Proposed Rule Changes

AT&T's suggested modifications to the Commission's proposed rule changes are appended as Attachment A hereto.² The comments below follow the order of the rules referenced in Appendix A to the NPRM.

A. Administrative Law Judges (§ 0.291)

AT&T supports the Commission's proposal (NPRM, ¶ 56) to permit the Common Carrier Bureau to refer fact-finding issues to administrative law judges so that they may

² See NPRM, ¶ 26 (requesting specific proposals to modify the Commission's proposed rules). AT&T's suggested additions to the proposed rules are underscored and suggested deletions are lined through. In addition, AT&T proposes modifications to Sections 1.729 and 1.730, which are not addressed in the Appendix to the Notice.

determine necessary facts on an expedited basis. Given the Commission's limited staff and the compressed timeframes for decisions, this is a reasonable and practical modification of the Commission's delegation authority. In addition, if bureaus other than the Common Carrier Bureau will be charged with the responsibility to resolve complaints, similar modifications should be made to their delegated authority.³

B. Service of Documents (§ 1.47)

With one minor exception, AT&T supports the proposed modifications to Section 1.47 regarding the service of documents. Given the geographic dispersion of carriers subject to the Commission's jurisdiction and the need to serve parties promptly, it is appropriate for the Commission to adopt a specific rule that requires all such carriers to have an agent for the service of process in the District of Columbia. Because these agents are designated solely for business purposes, however, the agent should not be required to state a place of "residence" in the District; rather, the proposed rule should be modified to reference the agent's "usual place of business."

³ In contrast, there does not appear to be a need to establish a "panel of neutral industry members" to help resolve technical or other business disputes (NPRM, ¶ 29). The issues of potential dispute are so wide and varied that any use of such experts should be left to a case-by-case determination, with the consent of the parties.

C. General Pleading Requirements (§ 1.720)

AT&T strongly supports the proposed changes to Section 1.720. In particular, as noted above, AT&T supports the use of administrative law judges as fact finders in appropriate situations, and it also supports the requirement that all pleadings must be explicit. Given the short deadlines for resolution of formal complaints, the parties and the Commission cannot proceed in the absence of clear and specific statements of the claims and defenses at issue. In addition, a requirement that the parties specifically refer to and append copies of relevant tariff provisions will assist all involved persons by providing ready access to information that is often critical to a Commission decision.

D. Format and Content [of Complaints] (§ 1.721)

AT&T supports the explicit requirements of proposed Sections 1.721(a)(5)-(7). In particular, AT&T agrees that formal complaints should be supported by affidavits and the documentation described in the proposed rule, i.e., copies of applicable agreements, offers, counter-offers, denials, or other relevant correspondence, that are sufficient to establish a prima facie showing.⁴

⁴ A prima facie showing cannot be based solely on assertions that are based on "information and belief" and complaints based solely on such allegations should be prohibited (see NPRM, ¶ 38). Similarly, complaints that

(footnote continued on following page)

Such information is often critical to understanding the parties' positions on the matters at issue. This requirement should not be misconstrued, however, to include all documents that might be viewed as relevant in discovery. Such broader discovery issues should be resolved after the pleadings are filed.

Although AT&T agrees with the Commission's interest in encouraging discussions between potential litigants to settle claims or narrow the scope of issues (NPRM, ¶ 27), AT&T opposes the proposed requirement that complainants certify they have discussed, or attempted to discuss, the possibility of settlement with defendants' representatives as a condition to filing a complaint (Section 1.721(a)(8)). Any requirement that a complainant affirmatively undertake such pre-filing requirements would be an improper restriction on a party's unconditional statutory right to file a complaint.⁵

In contrast, it is reasonable to require complainants to advise the Commission whether the complaint

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do not append the required information should be subject to summary dismissal (*id.* ¶ 39).

⁵ *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973). To the extent settlement discussions have occurred before the filing of a complaint, AT&T does not oppose a requirement that these efforts be noted in the complaint.

seeks relief that is identical to the relief proposed or at issue in an ongoing Commission proceeding (Section 1.721(a)(9)). This information will be helpful to the parties and the Commission staff in framing the issues that should be resolved in the specific complaint proceeding, as opposed to the more generic one. It may also point to relevant arguments or information that will help the parties and the Commission review and analyze the complainant's claims.

Proposed Section 1.721(10) would require complainants to append to their complaints a copy or description of relevant documents, data compilations and tangible things that the complainant believes are relevant to the disputed facts.⁶ It would be appropriate to apply this rule to complaints brought under the 90-day time period of Section 271(d)(6)(B), but not to other complaints. For cases that must be decided within 90 days, the opportunities for discovery will be extremely limited. AT&T thus agrees that complainants in such cases should be required to supply the identified information. This will enable the Commission staff and the defendant to review the complaint and prepare

⁶ See NPRM, ¶ 43. Because there are no "disputed" facts at the time the complaint is filed, complainants should be required to identify documents (and individuals' knowledge (see Section 1.721(a)(11)) relevant to the "material" facts that are alleged.

more quickly. However, the second sentence of this proposed rule should be expanded and clarified to permit the complainant to identify (but not produce) documents as to which claims of privilege are asserted, and to provide an explanation of the basis for the privilege.

In contrast, when cases can be decided on a longer track, such as complaints under Section 208, it would be more practical to combine all document production with the rulings at the initial pre-trial conference. Such conferences will be held very shortly after the pleadings are filed (See Section 1.733), and it would be more efficient to enable both parties to raise any issues about document production at that conference. Accordingly, proposed Section 1.721(10) should apply only to cases brought pursuant to Section 271(d)(6)(B) of the Act.

AT&T agrees that complainants should be required to provide the names and business addresses of individuals that are likely to have discoverable information related to the facts alleged in the complaint (Section 1.721(11)). However, no party should be obliged to disclose the telephone number of any individual represented by counsel,

including employees of any party. Such persons should always be contacted through counsel.⁷

E. Damages (§ 1.722)

The NPRM (§ 63) correctly finds that the new deadlines imposed by the 1996 Act "substantially affect the Commission's ability to resolve both liability and damages issues within the same timeframes." Therefore, AT&T concurs with and supports the proposed changes to this rule. In particular, AT&T concurs that claimants should be allowed to defer litigation of damage claims to supplemental complaints filed within a reasonable time after a finding of liability (Section 1.722(b)). Especially given the strict timelines for deciding formal complaints, AT&T agrees that voluntary bifurcation is permissible under the 1996 Act -- as it is under existing Commission rules -- and should be encouraged whenever it is reasonable.⁸

⁷ The Formal Complaint Intake Form (Section 1.721(12)) can serve as a useful reminder and checklist for parties wishing to file formal complaints (see NPRM, § 34).

⁸ There are some cases under prior law which have held that liability judgments standing alone are not final, because review at that point would "disrupt the administrative process." See, e.g., Mountain States Tel. & Tel. v. AT&T, 951 F.2d 1259 (10th Cir. 1991), citing Bell v. New Jersey, 451 U.S. 773, 779 (1982). Under the shorter time frames required in the 1996 Act, however, requiring the Commission to resolve both liability and damages issues within those intervals would itself disrupt the administrative process. Accordingly, even mandatory bifurcation of the liability and equitable relief phase of a complaint proceeding from the monetary damages phase

AT&T also agrees that the parties should be permitted to refer factual issues relating to damage claims to administrative law judges (Section 1.722(d)(1); NPRM, ¶ 68) and that the Commission may properly require a defendant in a bifurcated case to deposit into escrow an amount found on preliminary investigation to be a reasonable approximation of the damages that would be due upon final resolution (Section 1.722(2)). However, the defendant in such cases should also have the option of posting a bond in lieu of establishing an escrow account.

Finally, AT&T does not oppose the Commission's proposal to end its adjudication of damages claims with a determination about the sufficiency of the computation submitted by the complainant (NPRM, ¶ 66), provided, however, that the Commission remains available to resolve further disputes on the computation of damages. Otherwise, the parties would not be able to obtain a full adjudication of damage claims by the Commission.

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is reasonable and conducive to the orderly administration of justice, especially in cases where the liability issues are complex and the amount of damages cannot be determined until after a finding of liability.

F. Answers (§ 1.724)

AT&T supports the proposal to reduce the time to answer formal complaints to 20 days (Section 1.724(a); NPRM, ¶ 47). This reduction is necessary to enable the Commission and the parties to meet the statutory deadlines. Similarly, the changes proposed in Sections 1.722(b) and (c) will add to the specificity of the pleadings and will enable the parties and the Commission to focus on disputed matters more quickly. In particular, AT&T supports the proposal to prohibit general denials.

AT&T recommends that the proposed requirements for Section 1.724(g) apply only to cases brought pursuant to Section 271(d)(6)(B) for the same reasons it supports parallel changes in the proposed rules on complaints (see pp. 7-8 above). Similarly, defendants should not be required to provide the telephone number of any individual, including employees or agents, who are represented by counsel (see Section 1.742(h) and pp. 8-9 above).

G. Cross-Complaints and Counterclaims (§ 1.725)

AT&T opposes any requirement that would require a defendant to file a compulsory counterclaim in response to a formal complaint (Section 1.725(a); NPRM, ¶ 70). Given the short time a defendant has to respond to the complainant's allegations, it would be a hardship to require defendants to prosecute counterclaims simultaneously. Even the

Commission's current rules, which were adopted under a much more lengthy timetable for decisions, do not impose a compulsory counterclaim requirement, and there is no reason to impose such a duty now. Accordingly, proposed Section 1.725(a) should be deleted.

In addition, the text of proposed Section 1.725(b) should be modified to provide that all counterclaims a defendant chooses to bring will be treated as permissive. If the defendant wishes such claims to be resolved in the same proceeding as the complaint, they should be pleaded specifically in the answer using the same pleading requirements as for complaints. No counterclaim should be barred, however, simply because the defendant has chosen to litigate a claim at another time, or in another forum.⁹

AT&T does not oppose proposed Section 1.725(c), which provides for the handling of cross-claims, all of which are properly treated as permissive.

⁹ In order to assure that the Commission and parties can focus on a single set of relevant facts, the Commission may wish to require that any counterclaim in a formal complaint proceeding must arise out of the same transaction or occurrence that is the subject matter of the complaint. This would not bar the defendant from raising other claims, it would simply require the defendant to litigate its separate claims in a separate proceeding.

H. Replies (§ 1.726)

AT&T agrees with the Commission's proposal (NPRM, ¶ 72) that replies should be prohibited except when specifically authorized by the Commission (Section 1.726(a)), and that requests to file a reply should be made promptly (Section 1.726(b)). There is no reason to allow the pleading process to drag out, especially when the Commission expects to hold status conferences shortly after the answer is filed (see Section 1.733). Consistent with AT&T's positions on other pleadings, the document production/identification requirements of Section 1.725(c) should be limited to cases brought pursuant to Section 271(d)(6)(B). In addition, given the short interval for producing or identifying such documents (only five days after receipt of the affirmative defenses alleged in the answer), the complainant should be permitted to file a statement explaining why the documents could not be produced or identified in that time.¹⁰

I. Motions (§ 1.727)

Given the additional rules requiring specific pleadings and the promptness with which status conferences will be held, AT&T agrees that there should be no need for

¹⁰ For the reasons stated above (pp. 8-9), complainants filing a reply should not be required to provide the telephone number of any person represented by counsel.

motions to make the allegations in the complaint more specific (Section 1.727(b); NPRM, ¶ 76). AT&T also agrees that the parties should provide proposed orders with their motion papers (Sections 1.727(c) and (d); NPRM, ¶ 41). This will facilitate the Commission's ability to issue orders promptly.

AT&T further suggests that the party making a motion should provide other affected parties with at least two business days' notice of its intent to make a procedural motion¹¹ and its reasons for making the motion.¹² Such a requirement may lead to an early resolution of the issues and will give the non-moving party reasonable notice of the moving party's intentions and the bases for its claims. In addition, the Commission properly proposes (NPRM, ¶ 75) to require parties filing motions to compel to certify that they have made a good faith effort to resolve the matter prior to filing.¹³

¹¹ Substantive motions, such as motions to dismiss, would not be affected by this requirement.

¹² In cases where advance notice is required, the notice may be provided by telephone.

¹³ Although AT&T does not oppose making the failure to file an opposition to a motion "possible grounds for granting the motion" (NPRM, ¶ 77; emphasis added), lack of a written opposition should not automatically be a basis for granting any motion.

J. Interrogatories to Parties (§ 1.729)

The strict deadlines of the 1996 Act leave no time for unnecessary disputes over discovery matters. Nevertheless, it would be inappropriate and unduly restrictive of parties' rights to exclude all discovery in complaint proceedings. The best way for the Commission to assure that neither party takes improper advantage of the discovery process is to place all discovery requests within the control of the Commission staff. This is consistent with the Commission's belief (NPRM, ¶ 49) that "one of the key elements to streamlining the enforcement process is to maximize staff control over the discovery process."

The NPRM does not propose any changes to the Commission's existing rule on interrogatories. Changes to this rule are required, however, if the Commission is to assume control over all discovery, because the existing rule on interrogatories is self-executing and permits parties to serve interrogatories without Commission approval. The changes AT&T proposes to Section 1.729(a) are necessary to make all use of interrogatories subject to the Commission's control, both as to number and scope.¹⁴ AT&T's proposed

¹⁴ The "alternative" approach discussed in the NPRM (¶ 51) of permitting some fixed number of interrogatories would do little to ameliorate potential abuses. Moreover, no fixed number of interrogatories could ever be expected to address this issue more efficiently than a Commission

changes to Section 1.729(b) give the Commission control over the time parties will have to answer interrogatories, and the proposed changes to Section 1.729(c) give the Commission control over motions to compel responses.¹⁵

Because the Commission will only permit interrogatories when it determines such discovery is appropriate, and because the Commission's decisional deadlines are short, AT&T proposes that Section 1.729(d) be amended to require that responses to interrogatories be filed with the Commission unless the Commission directs the party not to do so. Finally, because of the other proposed changes, Section 1.729(e) is superfluous and should be deleted.

K. Other Forms of Discovery (§ 1.730)

Because of the compressed timeframes established by the 1996 Act, AT&T also suggests some modifications to Section 1.730, which governs other forms of discovery. First, AT&T recommends that Section 1.730(a) be clarified to

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ruling at a status conference held promptly after issue is joined.

¹⁵ The NPRM (§ 54) correctly recognizes that the Commission does not have authority to award costs in a formal complaint proceeding. Accordingly, there is no basis for establishing "voluntary" rules for the handling of costs (id.).

provide that all discovery requests must ordinarily be made at the initial status conference, and that additional discovery requests will only be entertained in extraordinary circumstances. This rule will require the parties to focus their preparation at the earliest stages and will prevent last-minute requests that might jeopardize the Commission's ability to conclude cases in the required time. Second, in the event a party wishes to file a motion seeking additional discovery, the rule should provide that the motion must state whether the request has been discussed with the party from whom discovery is sought and that party's reasons for opposing such discovery.¹⁶ Finally, in the event a discovery motion is made, the opposing party should be required to respond within five, rather than ten, days.

L. Other Required Written Submissions (§ 1.732)

The timing requirements of the proposed rules must be changed to accommodate the new decision schedules required by the 1996 Act (see NPRM, ¶ 82). Thus, AT&T proposes that initial briefs must be filed within 85 days, unless the complaint is brought under Section 271(d)(6)(B), in which case briefs should be submitted within 45 days after the complaint is filed (Section 1.732(b)). Similarly,

¹⁶ This is a specific application of the general addition AT&T proposes to Section 1.727 (see p. 14 above).

reply briefs should be filed within 20 days of the initial briefs, except in cases under Section 271(d)(6)(B), which should only allow for a 10-day filing period (Section 1.732(d)).

Parties should always be given a reasonable opportunity to file written briefs in support of their claims or defenses (see NPRM, ¶ 81). Prohibiting briefs would deny the parties elementary due process rights, especially in cases where there is no other opportunity for a hearing. The Commission may, of course, limit the scope of briefs to disputed issues and adopt reasonable timing and page limitations. Accordingly, AT&T does not oppose the reduction in the brief length provided for in Section 1.732(b) (from 35 to 25 pages), provided that parties are expressly given the right to request the opportunity to file longer briefs. Similarly, AT&T does not oppose the deletion of the page limit in Section 1.732(c) (cases in which discovery has been conducted), because the staff's order should provide for a page limit that has been established in consultation with the parties. AT&T believes that there should be a difference in the length of reply briefs, depending on whether or not discovery has been permitted (see Section 1.732(d)). The difference recognized in sections (b) and (c) for initial pleadings should be preserved for replies. In addition, parties should be

expressly permitted to obtain permission to file longer reply briefs.

AT&T agrees that the parties should prepare a statement of stipulated facts promptly after the answer is filed and before the initial status conference (see Section 1.732(h); NPRM, ¶ 80). However, it is not necessary to submit this statement within five days of the answer. Rather, the submission should be keyed to the date of the initial status conference. AT&T suggests that such submission be made two days in advance of the initial status conference.

M. Status Conference (§ 1.733)

AT&T strongly supports the Commission's proposal to hold a status conference promptly after issue has been joined (NPRM, ¶ 50). In order to expedite the process and to provide certainty, AT&T suggests that the rule provide a date certain for the conference, i.e., the tenth calendar day after the answer is filed (or the first business day thereafter). The Commission may, of course, modify this schedule by notifying the parties.¹⁷

¹⁷ In order to clarify that the parties do not have the right to issue self-executing interrogatories, AT&T also proposes a modification to Section 1.733(a)(5), which includes all the kinds of discovery the Commission may order, including interrogatories.

At the initial status conference, the parties should be prepared to make all requests for discovery, and should provide supporting arguments to the staff on the need (or lack of need) for any such requests. In order to facilitate its decision-making, the Commission staff also has the right under Section 1.733(a)(5) to require the parties to submit prompt written support regarding disputed discovery matters.¹⁸

AT&T also suggests that the Commission modify Section 1.732(c) to require the parties to submit proposed forms of order only if there is no stenographic record of the conference (see NPRM, ¶ 59). That record, if made, should be the most authoritative source for the Commission's oral rulings. In addition, if there is no transcript, AT&T suggests that counsel should have at least two days to attempt to agree on a proposed joint order. Further, the parties should only be required to make reasonable efforts to submit a joint order. If they cannot agree on a joint form of order in all respects, each party should be required

¹⁸ Because most discovery decisions are based on the specific circumstances of a particular proceeding, there are few, if any, general standards that need to be developed for such matters (see NPRM, ¶ 50).

to submit a proposed order which it believes accurately reflects the Commission's rulings.¹⁹

Finally, it is not clear whether the Commission intended to delete Sections 1.733(d) and (e). Those rules should be retained to clarify that the Commission may hold status conferences telephonically (Section 1.733(d)) and that parties must attend scheduled conferences or waive their right to object to the holding of such conference under the Commission's ex parte rules (Section 1.733(e)).

N. Copies; Service; Separate Filings Against Multiple Defendants (§ 1.735)

The Commission should clarify the language of proposed Section 1.735(d) to provide that when complainants serve complaints on other parties they do so as limited agents for the Commission (see NPRM, ¶ 31). This is necessary because Section 208(a) of the Act specifically requires the Commission to commence formal complaints.²⁰ The Commission should also clarify under Section 1.735(e) that service of subsequent pleadings and briefs by facsimile will not be deemed to be hand delivery unless the facsimile

¹⁹ This could be accomplished by providing alternative forms of proposed language in a single document, each subscribed to by the sponsoring party.

²⁰ That section states that "a statement of the complaint thus made [by the complainant] shall be forwarded by the Commission to such [defendant] common carrier" (emphasis added).

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arrives at the recipient's office by 4:30 p.m. local time on the same day.²¹ Otherwise, parties could attempt to take advantage of the Commission's service rules (see Section 1.4) and effectively shorten what are already very tight timeframes for response.

Conclusion

For the reasons stated above, the Commission should modify its rules for formal complaint proceedings against common carriers consistent with the comments herein.

Respectfully submitted,

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²¹ See also NPRM, ¶ 35.

Attachment A

AT&T's Proposed Modifications to the Commission's Proposed Rule Changes for Formal Complaints

Section 0.291 - Authority Delegated

No proposed modifications

Section 1.47 - Service of Documents and Proof of Service

AT&T proposes the following modification:

(h) . . . Service of all notices, process, orders, decisions, and requirements of the Commission may be made by leaving a copy thereof with such designated agent at his office or usual place of ~~residence~~ business in the District of Columbia. . . .

Section 1.720 - General Pleading Requirements

No proposed modifications

Section 1.721 - Format and Content

(a) (5)-(7), (9) and (12) and (c) - No proposed modifications

~~(a) (8) - Certification that each complainant has discussed the possibility of settlement with each defendant prior to the filing of the formal complaint - [Delete entire section]~~

(a) (10) In cases brought under Section 271(d) (6) (B), A a copy of, or a description by category and location of all documents, data compilations and tangible things in the complainant's possession, custody or control that are relevant to the ~~disputed~~ material facts alleged with particularity in the complaint. The complaint may also include an explanation of why any relevant documents are believed to be privileged or confidential.

(a) (11) The name, business address and telephone number of each individual likely to have discoverable information relevant to the ~~disputed~~ material facts alleged with particularity in the complaint, identifying the subjects of information, provided that complainant need not provide telephone numbers of any individual represented by counsel.

Section 1.722 - Damages

(a) - (d) (1) - No proposed modifications